Supreme Court, U.S.
FILED
AUG 31 2007
OFFICE OF THE CLERK

No. 07-9

In the Supreme Court of the United States

CHARLES JOHNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the wetlands in this case are "waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*); 33 U.S.C. 1362(7).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C19) is reported at 467 F.3d 56. A prior opinion of the court of appeals (Pet. App. D1-D58) is reported at 437 F.3d 157. The orders of the district court (Pet. App. E1, F1-F2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2006. A petition for rehearing was denied on February 21, 2007 (Pet. App. A1-A2). On May 3, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including June 28, 2007 (see Pet. App. B1), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a civil enforcement action brought by the United States under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA). The district court held that petitioners' unpermitted discharges into wetlands violated the CWA, see Pet. App. E1, and the court of appeals affirmed, see *id.* at D1-D58.

Petitioners moved for rehearing en banc, noting this Court's grant of certiorari in *United States* v. *Rapanos*, 376 F.3d 629 (6th Cir. 2004). See Pet. App. C1. The court of appeals held the rehearing petition in abeyance pending this Court's decision in that case. See *ibid.* Following the decision in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006), the court of appeals granted rehearing, vacated its prior decision, issued a new opinion, and remanded the case to the district court for further proceedings in light of *Rapanos*. Pet. App. C1-C19. Petitioners now seek review of the court of appeals' remand order.

1. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency

(EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The Corps regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos*, *supra*. *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. See 126 S. Ct. at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such water bodies, *id.* at 2227.[2] Justice Kennedy interpreted

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or

the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236 (Kennedy, J., concurring in the judgment); see *id.* at 2248. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 2265-2266 & n.14 (Stevens, J., dissenting).

3. This case arises out of a civil enforcement action brought by the United States under the CWA. The government alleged that petitioners had violated the CWA by discharging fill material into wetlands at three sites in Carver, Massachusetts, to construct, expand, and maintain cranberry bogs. Pet. App. D3, D5-D8. The district court entered summary judgment for the United States on the issue of liability, *id.* at E1, and directed petitioners to perform restoration activities and pay a civil fine of $75,000, *id.* at F1-F2.

Petitioners moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), arguing that the subject wetlands were not part of "the waters of the United States" for purposes of the CWA. See Pet. App. D3. The district court denied the motion, holding that there was "a sufficient basis for the United States to

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"*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

exercise jurisdiction," given the "undisputed evidence" that the subject waters were "hydrologically connected to the navigable Weweantic River by nonnavigable tributaries." See *ibid.* (quoting district court opinion).

4. The court of appeals affirmed. Pet. App. D1-D58. The court concluded that the hydrological connection between each of the three target sites and the Weweantic River was sufficient to establish jurisdiction under the Clean Water Act and to avoid constitutional issues under the Commerce Clause. *Id.* at D29-D44. Judge Torruella dissented, finding that the United States "may not constitutionally regulate wetlands that are neither themselves navigable nor truly adjacent to navigable waters." *Id.* at D55 (citation and internal quotation marks omitted).

5. Petitioners sought rehearing en banc, and the court of appeals held the rehearing petition in abeyance in light of this Court's grant of certiorari in *Rapanos*. Pet. App. C1. After this Court issued its decision in *Rapanos*, the court of appeals in the instant case vacated its original decision, issued a new opinion, and remanded the case to the district court for further proceedings in light of *Rapanos*. *Id.* at C1-C19. Based on its analysis of the various opinions in *Rapanos*, *id.* at C4-C6, the court of appeals "conclude[d] that the United States may assert jurisdiction over the target sites if it meets either Justice Kennedy's legal standard or that of the plurality," *id.* at C7.

In explaining that conclusion, the court of appeals noted this Court's statement in *Marks* v. *United States*, 430 U.S. 188 (1977), that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those

Members who concurred in the judgments on the narrowest grounds." Pet. App. C10 (quoting *Marks*, 430 U.S. at 193). The court of appeals concluded that, for purposes of *Marks* analysis, one ground of decision can reliably be identified as "narrower" than another only when the first rationale is a "logical subset" of the second. *Id.* at C13 (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S. 1229 (1992)). The court further explained that "[t]his understanding of 'narrowest grounds' as used in *Marks* does not translate easily to the present situation" because "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Id.* at C14. The court of appeals also observed that, "[s]ince *Marks*, several members of [this] Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced." *Id.* at C16-C17.

The court of appeals concluded that "[t]he federal government can establish jurisdiction over [wetlands] if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." Pet. App. C17. The court explained that, because the four *Rapanos* dissenters would find federal regulatory jurisdiction in any case where either of those standards is satisfied, this approach "provides a simple and pragmatic way to assess what grounds would command a majority of the Court." *Id.* at C14. The court of appeals remanded the case to the district court for application of the standards set forth in the *Rapanos* opinions, noting that "the district court may conduct additional factfinding if it deems it

necessary." *Id.* at C17. The court observed that "the two members of the majority [on the court of appeals panel] each had different interpretations of the record," and it "urge[d] the parties and the district court to provide a clear factual record in the context of applying the new standards." *Id.* at C18.

Judge Torruella concurred in part and dissented in part. Pet. App. C18-C19. He would have held that the standard adopted by the *Rapanos* plurality "provides the proper constitutional limit on federal regulation under the Clean Water Act." *Id.* at C18.

ARGUMENT

Petitioners contend (Pet. 11) that the plurality opinion in *Rapanos*, see 126 S. Ct. at 2225-2227, articulated the "narrowest grounds" for the Court's decision and is therefore controlling in future cases under the principles set forth in *Marks*. Petitioners seek review (see Pet. 7-12) of the court of appeals' holding that, if the wetlands at issue in this case are found to satisfy the "significant nexus" standard articulated in Justice Kennedy's concurring opinion in *Rapanos*, see 126 S. Ct. at 2241, those wetlands are subject to federal regulatory jurisdiction under the CWA, whether or not they also satisfy the plurality's standard. The court of appeals' holding is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals did not apply this Court's decision in *Rapanos* to the wetlands at issue here, but instead remanded the case to allow the district court to perform that task in the first instance. Although peti-

tioners contend that the court of appeals' remand order announced an erroneous legal standard, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

If the district court on remand concludes that the wetlands at issue in this case satisfy the *Rapanos* plurality's standard for CWA coverage (or that they satisfy neither the plurality's standard nor that of Justice Kennedy), the aspect of the court of appeals' decision that petitioners find objectionable will have no practical impact on the disposition of the case. If the courts below ultimately conclude that the wetlands satisfy Justice Kennedy's standard but not that of the plurality, and if petitioners are subjected to CWA liability on that ground, petitioners can reassert their current challenge in a new petition for a writ of certiorari. Adherence to this Court's usual practice of awaiting the entry of final judgment is particularly appropriate here because *no* court has yet applied the legal standards set forth in *Rapanos* to the wetlands at issue in this case. The court of appeals expressed concern, moreover, that the existing factual record might be inadequate to that task, and it "urge[d] the parties and the district court to provide a clear factual record in the context of applying the new standards." Pet. App. C18. This Court's intervention therefore would be premature at the current stage of the pro-

ceedings, even if the question presented otherwise warranted review.

2. Petitioners contend (Pet. 4, 11) that, under this Court's decision in *Marks*, the plurality opinion in *Rapanos* established the controlling legal standard for determining whether the CWA encompasses particular wetlands. That argument lacks merit.

a. Under a proper understanding of *Rapanos*, the Corps and EPA may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265-2266 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the agencies' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members.

In *Marks*, this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)); see pp. 6-7, *supra*. Taken in isolation, the *Marks* Court's reference to "those Members who concurred in the judgment[]" might be read to suggest that lower courts, in determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the *Marks* test is "more easily

stated than applied to the various opinions supporting the result," *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case, *ibid.* (quoting *Nichols*, 511 U.S. at 745-746).

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in *Marks* provides a sensible approach to determining the controlling legal principles of the case. But in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser-included" version of the other.

In those circumstances, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view of the law that a majority of this Court has unambiguously embraced. *See Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement among the plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks*, as the holding of the Court); cf. *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1667, 1668-1669 n.15, 1671 (2007) (analyzing concurring

and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (same); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same).[3]

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in *Marks*, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to *Marks* in view of the absence of an opinion commanding a majority of the Court). The application of that approach here leads inexorably to the conclusion that regulatory jurisdiction exists whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members

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[3] Petitioners' reliance (Pet. 14) on *King* v. *Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc), is misplaced. In attempting to identify the rule of law established by this Court's fractured decision in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*), the court in *King* stated that it "d[id] not think [it was] free to combine a dissent with a concurrence to form a *Marks* majority." 950 F.2d at 783. That statement was dictum, however, since the court further determined that the approach to contingency enhancements endorsed in the *Delaware Valley II* concurrence "cannot possibly be thought a subset of the dissent's approach to the same issue." *Id.* at 784 n.7. The court in *King* concluded that it had "done [its] best to apply *Delaware Valley II* but ha[d] been unable to derive a governing rule from the opinion." *Id.* at 785. In any event, *King* predates the decisions of this Court cited in the text, which *have* analyzed concurring and dissenting opinions in prior cases to identify rules of law endorsed by a majority of the Court.

would find jurisdiction in either of those instances. See *id.* at 2265 (Stevens, J., dissenting).

b. Petitioners contend that the lower courts must apply solely the standard set forth by the *Rapanos* plurality, not that of Justice Kennedy, in determining whether particular wetlands fall within the CWA's coverage. In petitioners' view, the *Rapanos* plurality's standard states the "*narrowest grounds*" for the Court's holding, Pet. 4 (quoting *Marks*, 430 U.S. at 193), because "the plurality standard is a 'logical subset' of [Justice] Kennedy['s] standard," Pet. 11 (quoting Pet. App. C13). That argument lacks merit.

Contrary to petitioners' contention, the *Rapanos* plurality's standard for CWA coverage is not a "logical subset" of Justice Kennedy's standard. In *Rapanos*, five Justices agreed that the judgments of the Sixth Circuit in the consolidated cases under review should be vacated and the cases remanded for further proceedings. See 126 S. Ct. at 2235 (plurality opinion); *id.* at 2252 (Kennedy, J., concurring in the judgment). The plurality concluded that a remand was necessary because the court of appeals had not determined, and the existing record provided an inadequate basis for deciding, whether the tributaries at issue "contain[ed] a relatively permanent flow" or whether the pertinent wetlands "possess[ed] a continuous surface connection" to those tributaries. *Id.* at 2235. Justice Kennedy found a remand to be appropriate because neither the Corps nor the lower courts in the consolidated cases had addressed the question "whether the specific wetlands at issue possess a significant nexus with [traditional] navigable waters." *Id.* at 2252; see *id.* at 2250-2252.

Because neither of those grounds for decision is inherently narrower than the other, it is logically impossi-

ble to identify a consensus "narrowest" position among the views of the Justices who concurred in the judgment. Justice Kennedy observed that the plurality's test "covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)," 126 S. Ct. at 2246, and he indicated that at least some such wetlands would not fall within the CWA's coverage as he construed the statute, see *id.* at 2246, 2249. As the court of appeals correctly recognized in the remand order at issue here, that aspect of the *Rapanos* concurrence suggests that there are certain cases in which "the plurality's jurisdictional test would be satisfied, but Justice Kennedy's balancing of interests might militate against finding a significant nexus." Pet. App. C14; see *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (*Gerke*) (explaining that, in "a rare case," Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1"), petition for cert. pending, No. 06-1331 (filed Apr. 2, 2007).

Moreover, even if all wetlands satisfying the *Rapanos* plurality's standard for CWA coverage would also satisfy Justice Kennedy's "significant nexus" standard, petitioners would still be wrong in contending that the plurality's approach stated the "narrowest grounds" within the meaning of the *Marks* rule. To the contrary, Justice Kennedy's concurrence would then state the "narrowest grounds" because it would impose the least restrictive limits on the exercise of regulatory authority by the Corps and EPA, and because it would reflect the narrowest disagreement with the judgments under review in *Rapanos* and with the approach advocated by the four dissenters. In *Marks*, the Court explained that the narrowest ground for decision in *Memoirs* v. *Massachusetts*, 385 U.S. 413 (1966), was the rationale of the *Memoirs*

plurality, which allowed some government regulation of obscene materials, rather than the "broader grounds" urged by Justices Black and Douglas, who would have held "that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193. The Court in *Marks* thus treated the rationale that imposed less sweeping constitutional constraints on the government's authority to regulate obscenity (and that reflected the narrowest disagreement with the judgment under review and with the approaches advocated by the dissenters) as the narrower grounds for the decision in *Memoirs*. Petitioners' contrary suggestion—that the plurality opinion in *Rapanos* must be deemed the narrowest grounds for the *judgment* if it adopted the narrowest view of federal regulatory *jurisdiction* under the CWA—is thus inconsistent with both the logic and the square holding of *Marks* itself.

c. Petitioners contend (Pet. 4, 7-12) that the circuits are divided with respect to the standard to be used in identifying "the waters of the United States" in light of the various opinions in *Rapanos*. Contrary to petitioners' contention, the First Circuit's decision in this case does not squarely conflict with any decision of another court of appeals. In any event, the other courts of appeals that have considered the issue have rejected the proposition, advanced by petitioners in this case, that wetlands satisfying Justice Kennedy's legal standard but not that of the *Rapanos* plurality fall outside the CWA's coverage.

Petitioners assert (Pet. 4, 7, 9) that the court of appeals' application of *Marks* principles to the various opinions in *Rapanos* conflicts with the Seventh Circuit's decision in *Gerke*. In remanding the government's CWA en-

forcement action to the district court for further proceedings in light of *Rapanos*, the Seventh Circuit in *Gerke* stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." 464 F.3d at 725. The court observed that

> any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality).

Ibid. The court recognized, however, that "a rare case" may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality)," *ibid.*; see p. 14, *supra*, and it did not specify what it regarded as the proper disposition of such a case. The Seventh Circuit thus did not squarely reject the view, adopted by the First Circuit in this case, that federal regulatory jurisdiction under the CWA extends to all wetlands that are covered by either the *Rapanos* plurality's standard or that of Justice Kennedy. In any event, the decision in *Gerke* is flatly inconsistent with petitioners' contention that the *Rapanos* plurality's standard provides the *only* controlling rule of law.

Petitioners' reliance (Pet. 4) on *Northern California River Watch* v. *City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006), is also misplaced. On August 6, 2007, after the petition for a writ of certiorari in the instant case was filed, the Ninth Circuit withdrew its original opinion in *City of Healdsburg* and issued a new opinion in its place. See *Northern Cal. River Watch* v. *City of Healdsburg*,

No. 04-15442, 2007 WL 2230186. In its new opinion, the court stated that Justice Kennedy's concurring opinion in *Rapanos* constitutes "the narrowest ground to which a majority of the Justices would assent if forced to choose *in almost all cases*," and that the *Rapanos* concurrence "provides the controlling rule of law *for our case*." *Id.* at *6 (emphases added). The Ninth Circuit thus carefully refrained from stating a categorical rule concerning the import of the fractured opinions in *Rapanos*, and it did not specifically discuss the proper resolution of a coverage dispute involving wetlands that satisfy the *Rapanos* plurality's standard but not Justice Kennedy's. Analysis of that question was unnecessary because the Ninth Circuit held that Justice Kennedy's standard *was* satisfied and that the wetlands at issue therefore were covered by the CWA. See *id.* at *6-*7. Like the Seventh Circuit's decision in *Gerke*, moreover, the amended opinion in *City of Healdsburg* provides no support for petitioners' contention that the *Rapanos* plurality's standard constitutes the sole controlling rule of law.

Thus, the First, Seventh, and Ninth Circuits all agree that wetlands satisfying Justice Kennedy's "significant nexus" standard are covered by the CWA. In the instant case, the First Circuit squarely held that the CWA *also* encompasses wetlands that satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy. See Pet. App. C14 (explaining that, if the CWA term "waters of the United States" were read to exclude such wetlands, "there would be a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation"). No other court of appeals has specifically addressed the proper treatment under *Rapanos* of

wetlands that satisfy the plurality's standard but not that of Justice Kennedy. But even if a circuit conflict existed with respect to the CWA's application to that category of wetlands, the instant case would be an unsuitable vehicle to resolve the question. That is so both because it is currently unclear whether petitioners' own wetlands fall within that category (see pp. 8-9, *supra*), and because petitioners *agree* with the United States that wetlands in that category are covered by the CWA.

4. Petitioners contend that the "significant nexus" standard in Justice Kennedy's opinion "raises due process concerns" because it provides insufficient guidance to regulated parties. Pet. 14; see Pet. 14-17. Under settled legal principles, however, petitioners can prevail in such a challenge only by showing that the CWA term "waters of the United States," if construed in accordance with Justice Kennedy's "substantial nexus" standard, would be unconstitutionally vague as applied to petitioners' *own* conduct. See, *e.g.*, *United States* v. *Powell*, 423 U.S. 87, 92-93 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). Although petitioners assert (Pet. 17) that the standard articulated in Justice Kennedy's concurrence "is sure to result in inconsistent and unpredictable applications" in future cases, petitioners make no effort to demonstrate that the "significant nexus" standard is impermissibly vague as applied to the circumstances of this case. In any event, because no court has yet applied the "significant nexus" standard to the wetlands at issue here, this Court's consideration of petitioners' due process claim would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007